No. 21030

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MERLE W. MOORE,
Defendant.

Appeal of Lewis Roca Scoville Beauchamp & Linton and Harold R. Scoville, as collateral parties.

Brief of Appellants

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JURISDICTION

This is an appeal from an order entered by the United States District Court for the District of Arizona on March 29, 1966 (T. 45), in the case of United States of America vs. Merle W. Moore, No. C-16857 Phx., and from the order denying the motion for rehearing, entered on April 18, 1966. This order required appellants to make available to counsel for defendant Moore all of appellants' files pertaining to the case of United States v. Moore, subject to certain con-

ditions. Jurisdiction of this court is based on 28 U.S.C. Secs. 1291 and 1294. Jurisdiction of the district court in the action against Mr. Moore is based upon 18 U.S.C. Sec. 3231, but it is contended that the district court had no jurisdiction to enter its order against appellants, and that its order should be set aside for that reason. The court's order denying appellants' motion for rehearing allowed ten days within which to appeal. The notice of appeal and bond for costs on appeal were timely filed on April 28, 1966. (T. 51-52)

STATEMENT OF FACTS

On February 18, 1964, the Grand Jury for the District of Arizona indicted Merle W. Moore for wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar years 1957 and 1958. (T. 1-3) Prior to the commencement of this action, appellants had been employed by Mr. Moore to represent him in connection with the investigation of his federal income tax returns. During the course of this employment, appellants received from the defendant Moore various documents and papers relating to the inquiry by the Internal Revenue Service, and began the preparation of materials for his defense.

Appellants rendered statements for legal services and cash advances to Mr. Moore in the total amounts of $5,013.00 and $541.05 respectively, on which he paid the sum of $574.73, leaving a balance of $4,997.32 which is presently due, owing and unpaid. Orally on September 27, 1963 and in writing on October 2, 1963, appellants advised Mr. Moore that they were not willing to do further legal work until statements for legal services rendered prior to that date were paid in full. At that time Mr. Moore had paid nothing

on account of statements rendered since October, 1962. (T. 22-23) Subsequently, it is believed that defendant retained W. Thomas Holmes, of Tucson, and H. M. Wales of Phoenix, as counsel. Appellants agreed to deliver the defendant's file in its entirety to Holmes and Wales upon their representation that the delinquent fees would be paid and the attorneys undertook to make arrangements to secure this payment. However, Mr. Moore failed to pay Holmes and Wales for legal services that they had rendered on his behalf. Thereupon, they also withdrew from representation and returned to appellants their original file, retaining only their own work papers and memoranda.

Mr. Philip Shea was then retained by Mr. Moore. On January 18, 1966, Mr. Shea filed a motion for order to show cause, which was followed by an order to show cause, issued by the district court and directed to W. Thomas Holmes, why he should not be ordered to turn over all files and papers relating to the case to the defendant or his attorney. (T. 10) On February 4, 1966, the court ordered that the files in the possession of Mr. Holmes be turned over to Mr. Shea, and Mr. Shea acknowledged that Mr. Holmes had fully complied with the order of the court. (T. 12)

As previously noted, however, the bulk of the files in Mr. Holmes' possession had been previously returned to appellants. Mr. Shea then petitioned on February 4, 1966 for an order to show cause why appellants should not turn over to him all files in their possession which belonged to Mr. Moore and which pertained to the action. (T. 13) The response to this order to show cause stated that all books and records belonging to Mr. Moore had been previously redelivered to Mr. Shea, and that Mr. Shea was now seeking the other items in the file that had never been the property of Mr. Moore. These materials consist of handwritten nota-

tions, computations and informal office memoranda prepared by appellants, copies of correspondence by appellants and correspondence received from various third persons, a copy of the transcript of testimony given by Mr. Moore to a Special Agent, medical reports concerning Mr. Moore, a copy of a brief prepared by Samuel J. Lanahan, and copies of pleadings and orders in the proceedings in district court. (T. 43-44)

On March 21, 1966, the order to show cause came on for hearing. The district court ordered:

> "That Lewis Roca Scoville Beauchamp & Linton and Philip Shea review the file in custody of said firm and that said firm deliver to Mr. Shea those instruments which, in the opinion of Mr. Shea, he believes to be necessary to the defense of the defendant, within 10 days from this date. At the conclusion of this case or termination of the services of Mr. Shea, those instruments currently in possession of Lewis Roca Scoville Beauchamp & Linton will be returned to that firm. This in no way shall affect the obligation of the defendant to pay the firm of Lewis Roca Scoville Beauchamp & Linton for the services rendered." (T. 61)

The formal order, from which this appeal is taken, was filed on March 29, 1966. (T. 45-46) This order, which is taken to supersede the minute entry of March 21, 1966, consists of the following:

> "ORDERED that the respondents make available to counsel for the defendant all of the defendant's files pertaining to this case subject, however, to the following terms and conditions:
>
> "The defendant's counsel may borrow from the files any payers which he regards necessary to the preparation of a proper defense of the defendant not including legal memoranda prepared by respondents; that the defendant's counsel maintain all papers which he bor-

rows pursuant to this order separate from all other papers in his file and that he return such borrowed papers to the respondents upon the conclusion of this case and the defendant's counsel advise the defendant of his obligation to pay the obligation of attorneys' fees owing to respondents."

Appellants were required to comply with this order on or before April 1, 1966. On April 1, 1966, however, appellants filed a motion for rehearing, (T. 22), that was denied on April 11, 1966. (T. 62) The next day, however, the district court vacated that order and reset the motion for rehearing for April 18, 1966. On that date the motion was argued and then denied. Ten days were given within which to appeal the order of March 29, 1966. (T. 62) Notice of appeal and bond for costs on appeal were timely filed in April 28, 1966. (T. 51-52) Execution of the order of March 29, 1966 has been stayed pending the determination of this appeal. (T. 62)

From this chronology, it is apparent that appellants are not parties to the main action, United States v. Merle W. Moore, in the United States District Court for the District of Arizona. Rather, appellants are bystanders who have been brought into that case for the sole purpose of obtaining their work product and other records for purposes of preparation of the defense of Mr. Moore. And, it should be also observed that although Mr. Shea is the nominal party seeking to obtain the records in question, his claim is derivative in the sense that he is seeking to obtain the file on behalf of his client, Mr. Moore, and his rights are only those of his client. Accordingly, the claim should be treated as being in actuality that of Mr. Moore for purposes of this appeal.

SPECIFICATIONS OF ERROR

1. The district court erred in conducting summary proceedings to require that appellants turn over the files that are sought in that no attorney-client relationship existed between appellants and Mr. Moore at the time of those proceedings.

2. The district court lacked jurisdiction to conduct these summary proceedings since there are no statutes or rules of criminal procedure that permit them.

3. The district court erred in determining that sufficient showing of necessity and good cause had been made by appellee to support a determination that there was a proper claim to the files that are sought.

QUESTIONS PRESENTED

1. Was it proper for the district court to conduct summary proceedings in this action to require that appellants turn over the files that are sought?

2. Was any proper showing of necessity and good cause made by appellee in proceedings before the district court to support a determination by that court that there is a proper claim to the files that are sought?

3. Has appellee demonstrated any proper claim to the files that are sought?

SUMMARY OF ARGUMENT

The district court's order of March 29, 1966, requiring appellants to turn over the files that have been sought by claimant is an appealable order under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541, 69 Sup. Ct. 1221, 93 L.Ed. 1528 (1949). This doctrine allows appeal from orders under 28 U.S.C. Sec. 1291 where the order determines a claim of rights separable

from and collateral to other rights asserted in the action that are too important to be denied review and too independent of the main case itself to require that appellate consideration be deferred until after the adjudication of the entire case. The collateral order doctrine has been applied in numerous contexts and has been specifically applied in the discovery context in the case of *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955).

The district court erred in conducting summary proceedings in this matter, because there was present no attorney client relationship between appellants and the claimant at that time. The files are not the property of the claimant, have not been refused in bad faith, or in violation of professional ethics, and accordingly the claimant should pursue whatever remedy he may have in an action at law. Summary proceedings should be approached with extreme caution and where there is doubt as to their propriety, the petitioner should be left to his remedy in ordinary legal proceedings.

Even assuming that under some circumstances the scope of the defendant's discovery power would reach items in the hands of third parties, no proper showing has been made here to warrant the district court's order. The situation of the demand by a former client of the files of his former attorney is directly analogous to the work product doctrine applied to discovery of materials of an attorney by adverse parties. *Hickman v. Taylor,* 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451 (1947), holds that in order to obtain materials in the hands of a respondent's attorney even where no attorney-client or professional privilege exists, a proper showing of necessity, prejudice and good cause is required. No such showing has been made here.

Even assuming that such a showing would have been made, the scope of discovery in the context of federal

criminal proceedings is much narrower than the liberality permitted for discovery in civil cases in the federal courts. The ability of a defendant in a federal criminal case to obtain materials from third parties is governed by Federal Rules of Criminal Procedure 16 and 17(c). Under neither of these rules is there authority for a defendant to obtain materials for pre-trial discovery purposes in the manner that has been done in the present case. The rules provide exclusive means for discovery in federal criminal cases. Since there is no authority in the applicable statutes or rules for this type of precedure the district court lacked jurisdiction to enter its order requiring that the files be produced for the inspection of the claimant. For these reasons, it is submitted that the district court's order should be reversed.

ARGUMENT

I. The District Court's Order of March 29, 1966 Is an Appealable Order.

Since the order appealed from is not the final judgment in the main criminal case that underlies the present appeal, the questioin arises as to whether the order of the court directing appellants to produce their files is an appealable order. This order was a final order within the meaning of 28 U.S.C. Sec. 1291; see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 Sup. Ct. 1221, 93 L.Ed. 1528 (1949), holding that under the "collateral order" doctrine, an order denying defendant corporation's motion to require plaintiff and intervenor to give security for expenses was an appealable final decision within the meaning of 28 U.S.C. Sec. 1291, since:

> "The decision appears to fall in that small class which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of

> the cause itself to require that appellate consideration be deferred until the entire case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. . . .
>
> "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-47.

The Court further stated that the order "does not make any steps toward final disposition of the merits of the case that will not be merged in the final judgment." 337 U.S. at 546. The only relationship of appellants to the main criminal action is the demand made upon them for the production of certain files. Appellants are not parties to the main criminal action for any other purpose. The order that has directed them to turn over their files is a final order as to them, since no further proceedings are to be taken with respect to them.

This rationale has been applied in the discovery context in the case of *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955). In that case, an action by a bank against a surety to recover for the breach of an employee's indemnifying bond, the surety moved to have the bank produce reports of an examination made by national bank examiners. The acting Secretary of the Treasury asserted a claim of privilege, and the District Court denied its claim. The Court of Appeals held the order appealable, because the employment privilege would be irretrievably breached and beyond protection if an appellate court were not able to review the District Court's order before determination of the main action. See also *Tomlinson v. Florida Iron & Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961), where the court held an order denying a motion to disqualify

an attorney appealable, applying the *Cohen* rule, since there was a final decision in an ancillary matter.

For other discussion of the applicability of the collateral order doctrine in the discovery context, see 4 *Moore, Federal Practice,* ¶ 26.37 [1.-2], at 1719; ¶ 54.14; *Developments in the Law—Discovery,* 74 Harv. L. Rev. 940, 999-1000 (1961).* The district court's order of March 29, 1966 is a collateral order and thus final.

II. It Was Improper for the District Court to Conduct Summary Proceedings to Require That Appellants Turn Over the Files That Are Sought.

A review of the Statement of Facts clearly demonstrates that the proceedings before the district court were summary in character. The only hearings that were held were on the orders to show cause and the arguments following the granting of the order to produce the files. At no time was any evidence presented by the claimant that would indicate a proper legal claim to the files. The proceedings were of the sort that have been generally used to discipline attorneys in their relationship with their clients. As noted above, very early in these proceedings the materials in the files that were the property of Mr. Moore were returned to him, and a receipt was given for those items by Mr. Shea. Accordingly, this case is not one in which a client is seeking to obtain property that is rightfully his. Further, no relationship of attorney and client existed between appellants and Mr. Moore at the time of the summary proceedings. It is therefore inappropriate to treat the matter as one in which

*This latter symposium note states that no cases have been found explicitly refusing to apply the doctrine in the discovery context, and that "the judicially created collateral orders doctrine would seem the most hopeful present possibility for securing interlocutory review in the federal courts of orders compelling discovery." 74 Harv. L. Rev. at 999, 1000.

the court is supervising a present, continuing attorney client relationship. It has been held that a court has no summary jurisdiction over an attorney to compel him by order or rule of court to pay over moneys where the relationship of attorney and client did not exist. See *Brown v. Superior Court,* 78 Ariz. 120, 276 P.2d 540 (1954). Such a rule should equally be applicable to a demand for production of an attorney's files and work product, since these are also his property.

Since the case is not one in which the former client is seeking the return of his own papers or of money belonging to him, there is considerable doubt as to the propriety of his claim. The affidavit of Charles Crehore, (T. 43-44) indicates in detail the types of materials that are contained in the files. Because of the nature and the variety of these materials, there is at the very least a question of fact as to the propriety of the claim. In such case, the plaintiff client is required to have recourse to his other remedies, that is, to bring an action at law. In *Application of Longhorne,* 105 N.Y.S. 2d 788 (Sup. Ct. 1951), the court held:

> "In all cases the client has relief in the ordinary tribunals for the determination of legal controversies, and, where his right to have a summary order can be reasonably questioned, he must be referred to the ordinary remedies. . . . One does not forfeit any of his rights by becoming an attorney at law. He has the same rights thereafter that other persons have, which includes the right to have asserted claims against him established in the regular and ordinary way, that is by action." 105 N.Y.S. at 789

An example of the caution with which courts approach the use of summary proceedings is reflected in *In re Long,* 287 N.Y. 449, 40 N.E.2d 247 (1942), where the court reversed summary proceedings in which a client sought to

obtain payment of moneys allegedly owing by his attorney. The court stated that summary proceedings

> "should always be exercised with great prudence and caution in a sedulous regard for the rights of the client on the one hand, and of the attorney on the other. It is not an absolute right that the client has, to invoke this severe and summary remedy against the attorney, but one always subject to discretion." 40 N.E.2d at 249.

And in *Gluckman v. Indig,* 161 Misc. 726, 292 N.Y.S. 791, *affirmed, In re Gluckman,* 250 App. Div. 989, 196 N.Y.S. 989 (1937), the court denied an application for summary proceedings, stating that such proceedings should be used cautiously because the order is a final determination of the attorney's rights. It held: "An officer of the courts should not be subjected to a summary proceeding unless it plainly appears that he is guilty of a breach of professional conduct or has acted in bad faith." 292 N.Y.S. at 793.

The file in this case shows that at no time has it been contended by the claimant that appellants have been guilty of a breach of professional conduct or have acted in bad faith in such a manner as to make it appropriate to proceed against them by way of summary proceedings. No attempt has been made to bring the files before the court in the manner contemplated by Federal Rule of Criminal Procedure 17(c), even assuming that this rule were to be applicable in the present context.

III. Even Assuming That Under Some Circumstances Claimant Would Be Entitled to the Production of the Files, No Appropriate Showing of Need Has Been Made Here.

The questions presented by this case, the availability to a former client of his attorneys' work product, are directly analogous to the questions involved in the context of dis-

covery by an adverse party of his opponent's attorneys' work product. The leading case as to the discovery of materials in the possession of an opponent's attorney is *Hickman v. Taylor*, 329 U.S. 495, 67 Sup. Ct. 385, 91 L.Ed. 451 (1947). The Court there held that plaintiff was not entitled to discover from adverse counsel reports relating to oral statements obtained from witnesses by the attorney, because full answers to interrogatories and other sources of information were available to him. Even though these work product materials were not privileged as being within the scope of the attorney-client or professional privilege, it was held that the attempt to secure written statements, private memoranda and personal reflections prepared or formed by an adverse party's counsel in the course of his legal duties

> "falls outside the area of discovery and contravenes the public policy underlying the execution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney . . . . In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 510.

The considerations governing the Court in the above portion of the opinion apply equally to the demands made by a former client for the attorney's work product. Of continuing concern to an attorney in the course of his representation of a client is the possibility that the client will be unwilling to pay for the benefits of the services that he has received. If, upon termination of representation for failure to pay the fees and advances that are owing, the client were able to take advantage of the attorney's efforts on his behalf during the period of their reprsentation,

there would be much greater difficulty in securing payment of legal fees and increased litigation over the custody of the attorney's work product files. Inevitably, to frustrate such demands and to make it more difficult for delinquent clients to obtain benefits of his labor, an attorney would be inclined to limit the placing in his files of his efforts, realizing that these might ultimately be obtained by the client without proper compensation. This concern is directly analogous to the following quotation from the *Hickman* opinion:

> "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." 329 U.S. at 511.

The *Hickman* case requires that before the work product of an attorney may be discovered, a sufficient showing of the necessity for the production of the material and a demonstration that the denial of production would cause hardship or injustice, or unduly prejudice the preparation of the client's case. 329 U.S. at 509. No such showing has been made here. Accordingly, it is submitted that under the Federal Rules of Criminal Procedure, as under the Federal Rules of Civil Procedure, such a demand is improper until a proper showing has been made.

The principle of *Hickman v. Taylor* has been applied to the demand of a former client in *Marco v. Sachs,* 109 N.Y.S. 2d 224 (Sup. Ct. 1951). There it was held that a paper drawn for the professional guidance and convenience of one of the former attorneys of a corporation with respect to a trans-

action in which he had represented it was not subject to discovery. Although the demand was brought by a plaintiff shareholder for production, the corporation that the attorney formerly represented also joined in the request. The court denied discovery, stating:

> "As a private paper of the attorney, it constitutes part of his work product and his personal property and is not subject to the demand or control of the client or former client, Blue Ridge Corporation." 109 N.Y.S.2d at 225.

A discussion of this suggested analogy has also been made in Novick, *Some Reflections on the Termination of the Attorney Client Relationship,* 44 Mass. L.Q. 41 (Oct. 1959). Novick concludes that the attorney's work product should be protected from a former client, both under the *Hickman* rationale, and because such papers are in the nature of trade secrets that are protected from discovery under Federal Rule of Civil Procedure 30(b).

IV. The Scope of Discovery Permitted by the Federal Rules of Criminal Procedure Does Not Extend to the Present Demand.

It is to be emphasized that the present case is a criminal action, not a civil case. The Federal Rules of Criminal Procedure, under which Mr. Moore and his counsel must proceed, contain no provision for the discovery of materials from third persons for pre-trial preparation, such as are contained in the civil rules. Federal Rule of Criminal Procedure 16 permits the court upon motion of a defendant only to order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the item sought

may be material to the preparation of his defense and that the request is reasonable. But this rule contains no provision for discovery from third persons prior to trial. Although Federal Rule of Criminal Procedure 17(c) permits the use of a subpoena to compel persons to whom it is directed to produce designated books, papers, documents or other objects, this procedure was not attempted in the present case.

It has been held that the only rights of pre-trial discovery given to a defendant in a criminal case are those in Rules 16 and 17(c). See *United States v. Palermo,* 21 F.R.D. 11 (S.D.N.Y. 1957). And, in general, the Federal Rules have been held to provide exclusive remedies. The contention has been rejected that a district court possess inherent powers in addition to those set forth in the Rules. See *Societe Internationale, etc. v. Rogers,* 357 U.S. 197, 78 Sup. Ct. 1087, 2 L.Ed. 2d 1255 (1958). The use of a subpoena duces tecum procedure is not intended to provide additional means of discovery, but only to expedite trial by providing a time and place before trial for the inspection of subpoenaed materials. *Bowman Dairy Co. v. United States,* 341 U.S. 214, 71 Sup. Ct. 675, 95 L.Ed. 879 (1951). The subpoena procedure is designed only to establish liberal policy for the production, inspection and use of materials at the trial. *In re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 12 (2d Cir. 1962), *cert. denied,* 373 U.S. 902, 83 Sup. Ct. 1289, 10 L.Ed. 2d 198 (1963).

It has been repeatedly held that the purpose of the subpoena procedure is not a pre-trial discovery procedure but is designed as an aid in obtaining evidence which defendant can use at trial when good cause has been shown. See *United States v. Smith,* 209 F.Supp. 907 (E.D. Ill. 1962); *United States v. Ferguson,* 37 F.R.D. 6 (D.D.C. 1965); *United States v. Hanlin,* 29 F.R.D. 481, (W.D. Mo. 1962);

United States v. Abrams, 29 F.R.D. 178 (S.D.N.Y. 1961); *United States v. Van Allen,* 28 F.R.D. 329 (S.D.N.Y. 1961).

It is thus apparent that even had some sort of showing of need been made by claimant to the files in question, the Federal Rules of Criminal Procedure specify a scope of discovery much narrower than that permitted by the civil rules. Accordingly, it is submitted that the Rules of Criminal Procedure are the exclusive means of procedure in the conduct of Federal criminal cases, that their scope does not permit claimant to demand the files in question as pre-trial discovery from a third party, and that the district court lacked jurisdiction to enter such an order.

CONCLUSION

The proceedings in the district court have been unusual and irregular, to say the least. In those proceedings a former client's present attorney has attempted in a summary manner to obtain from appellants materials that appellants prepared or were prepared under their direction or in response to communications by them. There has been no showing that the papers in question ever belonged to the client, and there has been bad faith in withholding them, or that there has been any unprofessional conduct involved. These papers have no inherent value to the client, except as they may be used in the preparation of his defense. If they were so used, there would be no point in having them thereafter returned to appellants—they would have served their purpose. There has been no showing in the record that these materials are any way unique or that they are incapable of being independently prepared. Such a showing should be required before production is ordered. And, in any event, under the decisions construing Federal Rules of Criminal Procedure 16 and 17(c), pre-trial discovery of

third persons is inappropriate in a criminal case in the manner attempted here, and the district court lacked jurisdiction to enter such an order.

For the foregoing reasons, therefore, it is respectfully submitted that the district court's order directing production of the materials sought by Mr. Moore and his present counsel be reversed.

Respectfully submitted,

Lewis Roca Scoville Beauchamp
and Harold R. Scoville

By John P. Frank
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Attorneys for Appellants

July, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Paul G. Ulrich